85-2106

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

vs.

PI KAPPA ALPHA FRATERNITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Does the use of deception by law enforcement officers to gain entry into a home violate the Fourth and Fourteenth Amendments to the United States Constitution when the agents are not invited into the home for the specific purpose of engaging in any kind of illegal activity?

2. Whether the rulings in *Lewis* v. *United States*, 385 U.S. 206 (1966) and *Gouled* v. *United States*, 255 U.S. 298 (1921) were correctly interpreted by the Supreme Court of Ohio as holding that a deceptive entry into a private home constitutes an unreasonable search where such home is not a commercial center of criminal activity, and the invitation extended to the agents was not for the purpose of conducting illegal activities.

LIST OF PARTIES

Petitioner:
STATE OF OHIO

Respondent:
PI KAPPA ALPHA FRATERNITY

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No. _____

IN THE

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OCTOBER TERM, 1985

STATE OF OHIO,

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vs.

PI KAPPA ALPHA FRATERNITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Petitioner, State of Ohio, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Ohio rendered on the 23rd day of April, 1986.

OPINION BELOW

The opinion of the Supreme Court of Ohio, rendered on April 23, 1986, is reproduced in Appendix A.

JURISDICTION

The decision of the Supreme Court of Ohio was filed on April 23, 1986. This petition was filed within 60 days of April 23, 1986.

Although the syllabus of the decision of the Supreme Court of Ohio cites Section 14, Article I of the Ohio Constitution as the basis for its ruling, Petitioner submits that said decision did not rest upon an adequate and independent state ground. Rather, the majority of the cases cited in the opinion were federal cases dealing with a violation of the Fourth and Fourteenth Amendments to the United States Constitution. In

fact, the Supreme Court of Ohio placed principal reliance upon two United States Supreme Court decisions, to wit, *Gouled* v. *United States*, 255 U.S. 298 (1921), and *Lewis* v. *United States*, 385 U.S. 206 (1966). Since this state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, this Court may accept jurisdiction under 28 U.S.C. Section 1257(3). *Michigan* v. *Long*, 463 U.S. 1032 (1983). At the very least, this is one of those cases where the state court felt compelled to rule as it did by what it understood to be federal constitutional considerations. *Delaware* v. *Prouse*, 440 U.S. 648 (1979). Such being the case, Petitioner prays this Court to accept jurisdiction, and decide the federal issue, for if the state court erred in its understanding of the decision of the United States Supreme Court, this Court should so declare. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ohio Constitution, Article I, Section XIV:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 1, 1983, two "plain clothes" agents from the State of Ohio Department of Liquor Control sought admission into the defendant's residence for the prupose of investigating anonymous complaints concerning illegal sales of liquor. The house which the agents sought to enter served as a private residential facility for fraternity brothers. Admittance was restricted to fraternity members and their invited guests.

As the agents approached the property, they were met by the house manager who asked them the purpose of their visit. At that time neither agent identified themselves as liquor control agents, nor stated the true purpose of their visit. Instead, one agent represented himself as a Pi Kappa Alpha alumnus and stated that he wished to examine the fraternity house on behalf of a younger brother who was interested in joining. The other agent said nothing.

Based upon the one agent's fabricated story, the house manager not only admitted both agents into the house, but also gave them a guided tour. While present in the fraternity house, the liquor agents were escorted by the same house manager at all times. During the course of the tour the agents observed a soft drink vending machine, which advertised the fact that the contents of the machine were really cans of beer. Upon seeing this, one agent asked the house manager if he could purchase a beer from the vending machine. Upon

receiving permission from his escort, the agent deposited fifty cents in the machine, and received one can of Budweiser beer. After the purchase had been completed, the agent informed his host that he had changed his mind and desired to drink the beer at a later time. With that, the agent placed the beer can in his pocket, where the can remained until the agents exited the defendant's premises.

It was based upon the observation of the agents while in the house; the purchase of this one can of beer; and the fact that the fraternity lacked a license to sell beer, that the agents were able to obtain a search warrant, which was executed the next day.

The defendant was subsequently charged with three criminal offenses: sale of an alcoholic beverage without a permit, in violation of Ohio Revised Code § 4301.58(B); possession of alcoholic beverages for sale without a permit, in violation of Ohio Revised Code § 4301.58(B); and possession of untaxed alcoholic beverages, in violation of Ohio Revised Code § 4301.67.

Prior to the trial, the defendant filed a motion to suppress all evidence which had been seized by the agents on the date of the initial deceptive entry, and on the next day, pursuant to the search warrant. The trial court, citing *Gouled* v. *United States*, 255 U.S. 298 (1921) held that the means of entry by the agents violated the Fourth Amendment to the United States Constitution. The trial court then ordered the suppression of all evidence obtained as a result of the deception of the agents.

The state appealed the trial court's ruling. On December 26, 1984, the First District Court of Appeals of Ohio, distinguished the *Gouled* decision, and cited *Lewis* v. *United States*, 385 U.S. 206 (1966) as its basis for reversing the decision of the trial court.

The defendant then appealed that decision to the Supreme Court of Ohio. On April 23, 1986, the Supreme Court of Ohio, also citing *Gouled* and *Lewis*, reversed the lower ap-

pellate court decision, and affirmed the trial court's original order suppressing all evidence which was obtained as a result of the agent's deceptive entry.

It is this ruling by the Surpeme Court of Ohio that petitioner hereby seeks review.

REASONS FOR GRANTING THE WRIT

1. **The Supreme Court of Ohio based its decision in this case on its misinterpretation of *Gouled* v. *United States,* 255 U.S. 298 (1921) and *Lewis* v. *United States,* 385 U.S. 206 (1966), by holding that those cases permit a deceptive entry into a residence by government agents without a warrant only where the home is a commercial center for criminal activity and where the invitation is extended for the purpose of conducting illegal activities.**

In its decision in the present case, the Supreme Court of Ohio has superimposed on the Fourth and Fourteenth Amendments to the Constitution of the United States, a requirement that a home or office must be a center for commercial criminal activity and that an invitation to enter for the purpose of conducting illegal activity must be extended to government agents, who conceal their identity, in order for their warrantless search to be reasonable. This holding is contrary to the prior opinions of this Court which specify that a warrantless search is reasonable when the defendant has no legitimate expectation of privacy in the area searched. *Katz* v. *United States*, 389 U.S. 347 (1967), and when the government agents do not engage in conduct which exceeds the scope of their invitation. *Gouled* v. *United States*, 255 U.S. 298 (1921).

In determining whether a defendant has a reasonable expectation of privacy, this Court has clearly stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Therefore, the test of a reasonable

search or seizure does not turn on the nature of the area involved, *i.e.*, whether it is a commercial center for criminal activity.

Moreover, the fact that the government agents conceal their identities does not invalidate an otherwise reasonable search or seizure. In *Lewis* v. *United States*, 385 U.S. 206 (1966), this Court recognized the necessity for undercover police activity and the right of government agents to conceal their identities during the course of their covert operations. The fact that the owner of the property does not know the true identity of the persons in whom he places his confidence does not prevent the loss of his expectation of privacy when he willingly exposes his secret criminal activity. *United States* v. *Schuster*, 684 F.2d 744 (11th Cir. 1982). Even when a defendant relates a confidential matter to a friend or close associate, he runs the risk that his friend will cooperate with law enforcement. *Hoffa* v. *United States*, 385 U.S. 293, 303 (1966).

The holdings of the above cited cases are clearly applicable to the factual situation presented in the instant case. Here, we have a situation where the manager of the Pi Kappa Alpha fraternity house was confronted by two complete strangers, who sought entry into the house. The manager's options were simple: he could deny them access, or permit them to enter. He chose the latter, and by doing so, he waived any expectation of privacy in the house, so long as the agents' actions in the house did not exceed the scope of their invitation. The *Gouled* case stands for the proposition that subsequent activities by agents which exceed the scope of their invitation may serve as a basis for suppression of any evidence so uncovered. While the Ohio Supreme Court cites in its decision that it is following the *Gouled* case, here a member of the defendant's organization was present with the agents at all times. The agents acted purely within the scope of their invitation, and neither ransacked any part of the house, nor removed anything without first having received permission from an agent of the defendant.

2. The interpretation of federal law by the Supreme Court of Ohio conflicts with the interpretation propounded by the Federal Courts of Appeal.

While the Ohio Supreme Court purported to follow the *Lewis* decision, its interpretation of the holding of that case, which was related in petitioner's first argument, is contrary to that of the Federal Courts of Appeal. For example, in interpreting the *Lewis* decision, the Court of Appeals for the Tenth Circuit specifically rejected the defendant's contention that government agents acted improperly by using deception to gain entry when they were not invited into that residence for the purpose of engaging in illegal activities. *United States* v. *Oakes*, 564 F.2d 384 (10th Cir. 1977). The Court held that neither the defendant's intent in extending the invitation; nor the agent's intent in accepting the invitation was a critical factor. *Id.*, at 386. Rather, the critical factor was that the agent entered only at the defendant's invitation, and removed only that which was freely offered. *Id.* This same rationale has been explicitly followed by several other federal circuit courts, *e.g.*, *United States* v. *Wright*, 641 F.2d 602 (8th Cir. 1981); *United States* v. *Guidry*, 534 F.2d 1220 (6th Cir. 1976); *United States* v. *Glassel*, 488 F.2d 143 (9th Cir. 1973).

Furthermore, in *United States* v. *Scherer*, 673 F.2d 176 (7th Cir. 1982), the court dealt with a factual situation quite similar to that presented by the case before this Court, in that the suspect's home could not be categorized as a commercial center of criminal activity and the agents were not invited onto the premises for the purpose of engaging in illegal activities. In the *Scherer* case, the government agents were invited onto the defendant's property to build duck blinds. When they were given permission by the defendant's wife to search for wood, they observed two Thompson submachine guns in the barn.

The *Scherer* court recognized the right of law enforcement officers to obtain an invitation onto the premises by misrepresenting or concealing their identity. In so doing, the

court implicitedly rejected the theory that the intent of the defendant in extending the invitation or the intent of the government agents in accepting the invitation is the controlling factor. Furthermore, the court indicated that once entry has been gained in such a manner, the use of evidence of unlawful activity in plain view observed while the government agents were acting within the scope of their invitation did not violate the defendant's Fourth Amendment protection against unreasonable intrusions. The fact that the agents were aware before the visit of evid nce of illegal activity on the premises did not take the case out of the consent exception to the warrant requirement. *Scherer*, 673 F.2d at 182.

The above cases are all consistent in that they stand for the proposition that an entry by consent, even though obtained by ruse, does not impermissibly infringe on a defendant's Fourth Amendment rights; and once a suspect knowingly exposes to another that which would otherwise be private, he assumes the risk that his confidant may later expose his secrets; and thus, the defendant loses any legitimate expectation of privacy which the Fourth Amendment would otherwise protect.

3. The decision of the Ohio Supreme Court is impractical and will severely hamper legitimate law enforcement investigations.

This Court has previously recognized the necessity of covert investigations by law enforcement agents in their fight against crime. In footnote 6 of *Lewis* v. *United States*, 385 U.S. at 211, this Court states:

> Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. . .

The Supreme Court of Ohio, while claiming to follow the *Lewis* decision, has as a practical matter "come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se." *Lewis*, 385 U.S. at 210. Under this new ruling a person who uses his home to engage in illegal activities no longer needs to worry about losing any expectation of privacy he may have by exposing his activities to any other individual who may be present, so long as the suspect initially asks his guest whether he is either a police agent, or someone working with the police. Obviously, should the guest respond in the affirmative, entry will be denied. Should the guest lie, entry may be granted, but anything subsequently observed or taken will be suppressed.

Thus, the Supreme Court of Ohio has expanded the Fourth Amendment to protect wrongdoers from misplaced confidence in their associates, completely contrary to the holding of this Court in the *Hoffa* case.

CONCLUSION

The decision of the Supreme Court of Ohio misinterpreted several decisions by this Court, ignored numerous decisions by federal circuit courts, and establishes a rule of law which is contrary to public policy. The effect of this ruling is to expand the protection of the Fourth Amendment to an area never contemplated by the framers of our Constitution.

For the reasons stated, a Writ of Certiorari should issue to review the decision of the Supreme Court of Ohio in this case.

Respectfully submitted,

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APPENDIX A

THE STATE OF OHIO, APPELLEE, *v.* PI KAPPA ALPHA FRATERNITY, APPELLANT.

[Cite as State *v.* Pi Kappa Alpha Fraternity (1986), 23 Ohio St. 3d 141.]

Criminal law—Searches and seizures—Government officers not privileged to deceptively gain entry into private home or office without warrant, when.

O.Jur 3d Criminal Law §§ 503, 511.

Pursuant to Section 14, Article I of the Ohio Constitution, and in the absence of any judicially recognized exception to the warrant requirement, government officers are not privileged to deceptively gain entry into the private home or office of another without a warrant, where such home or office is not a commercial center of criminal activity, and where the invitation to enter the private home or office was not extended by the occupant for the purpose of conducting illegal activities. (*Gouled* v. *United States* [1921], 255 U.S. 298; and *Lewis* v. *United States* [1966], 385 U.S. 206, followed.)

(No. 85-219—Decided April 23, 1986.)

APPEAL from the Court of Appeals for Hamilton County.

On December 1, 1983, two agents employed by the Ohio Department of Liquor Control made a visit to the house of defendant-appellant, Pi Kappa Alpha fraternity. Apparently, the agents went to the fraternity house in order to investigate the validity of complaints made alleging that illegal sales of liquor were being perpetrated on defendant's premises. Upon walking up the driveway adjacent to the fraternity house, the agents were met by the fraternity house manager. It is conceded by the plaintiff-appellee, state of Ohio, that the agents did not identify themselves as liquor agents, nor did they reveal the true purpose of their visit. One of the agents

fabricated a story whereby he told the house manager that he was an alumnus of Pi Kappa Alpha fraternity in Georgia, and that he wished to examine the fraternity house on behalf of his brother who was interested in attending the University of Cincinnati and joining the defendant-fraternity. Upon hearing this, the house manager escorted the two around the inside of the fraternity house.

During the course of the tour, the agents observed a "Coke" machine containing several brands of beer. One of the agents asked permission to purchase a can of beer from the machine, which the house manager granted. The agent deposited fifty cents into the machine and received a can of beer which he put in his pocket. The agent stated that he intended to drink the beer later. Shortly thereafter, the tour of the house concluded, and one of the agents gave the house manager a fictitious name and address before departing the premises. The agents then set out to obtain a warrant to search the fraternity house.

The next day, the search warrant was executed and a search of the fraternity house ensued. On December 3, 1983, the defendant was charged, as an organization pursuant to R.C. 2901.23, with separate counts for selling an alcoholic beverage without a permit; possession of alcoholic beverages for sale without a permit; and, unlawful possession of untaxed alcoholic beverages in excess of one quart.

The matter proceeded to the Hamilton County Municipal Court, and defendant filed motions to suppress the evidence obtained during the search. After a hearing, the trial court granted defendant's motions to suppress, reasoning that since the agents gained entrance to the fraternity house by deception, they were therefore trespassers pursuant to R.C. 2911.21(C). The court relied on the decision in *Gouled* v. *United States* (1921), 255 U.S. 298, in stating that surreptitious entry by stealth, or through social acquaintance, or in the guise of a business call violates the Fourth Amendment. The court concluded that evidence seized in contravention of Fourth Amendment rights cannot be the basis of a valid search warrant and any evidence so acquired is inadmissible.

Upon appeal, the court of appeals reversed and remanded in a split decision. The appellate majority held that the agents had a "privilege" pursuant to R.C. 2911.21 to investigate complaints concerning the unlawful sale of beer by virtue of their status as individuals charged with the duty of enforcing Ohio's liquor laws. The court further held that in the exercise of that privilege, the agents were entitled to obtain admission to the fraternity house by the deception employed here, and that such deception did not violate the Fourth Amendment.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Richard A. Castellini, city solicitor, *Paul J. Gorman*, city prosecutor, and *Terrence R. Cosgrove*, for appellee.

Croswell & Adams Co., L.P.A., R. Scott Croswell III and *Elizabeth E. Agar*, for appellant.

SWEENEY, J. The state contends that undercover law enforcement officers, actively engaged in an official investigation, do not commit criminal trespass by gaining entry into the residence of another under false pretenses, since such noncoercive activity is privileged. The state further argues that the appellant fraternity waived any right to privacy in the areas of the fraternity house shown to the liquor agents, since the fraternity house manager consented to the agents' entry.

The fraternity argues that it did not waive its constitutional right to be free from an unreasonable search by consenting to the agents' entry, since the consent was obtained by deception and the invitation extended to the agents was not made for the purposes of conducting illegal activity within the fraternity house. The fraternity further contends that even a consensual entry constitutes a trespass, if the entry was gained by deception. Appellant submits that the agents were not privileged to enter the fraternity house, a private residence, since the entry was accomplished without a warrant, and since there were no exigent circumstances to justify the entry.

The central issue we must determine is whether the manner in which the liquor agents gained access to the interior of the fraternity house violated the Fourth and Fourteenth Amend-

ments and Section 14, Article I of the Ohio Constitution. The state submits that the United States Supreme Court has acknowledged that law enforcement agencies may use artifice and stratagem to ferret out criminal activities of certain types. *Lewis* v. *United States* (1966), 385 U.S. 206.

While it is beyond question that police officers must have the ability to engage in undercover activities in order to combat crime, we believe that the state and the court of appeals below have either missed or ignored the essential point of the *Lewis* case. In *Lewis*, the high court reconciled its prior holding in *Gouled* v. *United States* (1921), 255 U.S. 298. The high court, in *Gouled*, held as unconstitutional a situation where a business acquaintance of the petitioner acting under orders of federal officers deceptively obtained an invitation to a private office and then proceeded to ransack the office and seize certain private papers of an incriminating nature. The *Lewis* court stated at 211:

"* * * [W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the *Gouled* case, *supra*, is sufficient to dispose of that contention."

In the cause *sub judice*, we believe that it is clear that the liquor agents were not invited into the fraternity house for the purpose of conducting illegal business (*i.e.*, illegal sale of beer). Moreover, we find no evidence tending to show that the fraternity house was in any way a commercial center of criminal activity. Thus, it is our view that the *Lewis* case does not support the arguments proffered by the state, except insofar as *Lewis* endorsed the use of undercover police work in

order to ferret out criminal enterprises. Since neither *Lewis* nor *Gouled* supports the warrantless search herein, our inquiry turns to whether the instant search was nevertheless constitutional under any of the generally recognized exceptions to the warrant requirement. As appellant points out, "[i]t is axiomatic in our criminal justice system that warrantless searches are, per se, unreasonable, unless they fall within one of the established exceptions. *Katz* v. *United States*, 389 U.S. 347 (1967)."

We observe that although situations involving hot pursuit and exigent circumstances can transform an otherwise invalid warrantless entry or search into a valid one, the instant cause does not even remotely present either of these justifications. The trial court below correctly refuted the argument that the beer in question was in the "plain view" of the liquor agents. In *State* v. *Williams* (1978), 55 Ohio St. 2d 82 [9 O.O.3d 81], we stated in paragraph one of the syllabus: "In order for evidence to be seized under the plain view exception to the search warrant requirements it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; * * *."

In order for the initial intrusion of the liquor agents to have been lawful, the facts of the instant case require us to determine whether appellant freely and voluntarily consented to the liquor agents' entry and search. In this vein, the burden is upon the state to prove that consent was freely and voluntarily given. *Bumper* v. *North Carolina* (1968), 391 U.S. 543, 548 [46 O.O.2d 382].

In reviewing the facts of the instant cause, we note that it is conceded that the liquor agents gained invitation into the fraternity house by fabricating their identities as well as the true purpose of their visit. The invitation extended by the fraternity house manager, however, was clearly made for the purpose of exhibiting the fraternity house with the probable goal of recruiting a potential member. Such, in our view, does not amount to a free and voluntary consent to conduct illegal activity. Hence, we agree with the trial court that consent obtained through deception cannot be said to have been

given freely and voluntarily. *Gouled*, *supra*. Therefore, we concur in the trial court's finding that the state failed to sustain its burden of proof with respect to consent. Since the initial intrusion by the liquor agents was not lawful under *Williams*, *supra*, because it was based on a lack of voluntary consent, it necessarily follows that the beer in issue could not have been constitutionally seized under the "plain view" exception justifying warrantless searches.[1]

By the same token, we reject the appellate court's holding that the liquor agents' presence at the fraternity house was privileged since they were investigating allegations of illegal activities in the course and scope of their official duties. While, at times, police officers may be privileged to enter or remain on the premises of another without the consent of the owner or occupier, the facts of the cause *sub judice* compel us to find a total lack of a privileged entry here. Thus, we reverse the court of appeals' conclusion with respect to privilege, and find that the trial court correctly granted the appellant's motions to suppress.

Based upon the foregoing, we hold that under *Gouled*, *supra*, and *Lewis*, *supra*, and pursuant to Section 14, Article I of the Ohio Constitution, and in the absence of any judicially recognized exception to the warrant requirement, government officers are not privileged to deceptively gain entry into the private home or office of another without a warrant, where such home or office is not a commercial center of criminal activity, and where the invitation to enter the private home or office was not extended by the occupant for the purpose of conducting illegal activities.

In line with the spirit of *Lewis*, our holding today should in no way be interpreted as a limitation on the ability of the

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[1] We also note that under the facts of this case, the second requirement under *Williams*, *supra*, for a valid "plain view" warrantless search was not met; namely, that the discovery of the evidence was inadvertent. Arguably, the third requirement of *Williams* was met; however, without satisfaction of the first and second requirements, the "plain view" exception is inapplicable.

police to employ artifice and stratagem in their efforts toward ferreting out criminal activity in our society. Rather, our disposition herein is designed to reaffirm those priceless constitutional freedoms which the framers of both the United States and Ohio Constitutions intended to protect.

Therefore, we reverse the judgment of the court of appeals and remand the cause for further proceedings in accordance with law.

Judgment reversed
and cause remanded.

HOLMES, CORRIGANand DOUGLAS, JJ., concur.

CELEBREZZE, C.J., LOCHER and WRIGHT, JJ., concur in judgment only.

CORRIGAN, J., of the Eighth Appellate District, sitting for C. BROWN, J.